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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 371

CROWN COAT FRONT CO., INC., PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 14) is reported at 363 F. 2d 407. The opinion of the district court (R. 7) is not reported.

JURISDICTION

The judgment of the court of appeals (R. 33) was entered on June 22, 1966. The petition for a writ of certiorari was filed on July 20, 1965, and granted on October 10, 1966 (R. 34). This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

In 1956, petitioner completed performance of a government contract containing a standard disputes

clause. In 1961, petitioner (for the first time) filed a claim under the clause with the contracting officer. In 1963—five months after final administrative denial of his claim but more than six years after contractual performance had been completed—petitioner brought this action for damages against the United States under the Tucker Act. The ultimate question presented is whether its suit was barred by the six-year statute of limitations applicable to such actions. This in turn depends on whether (1) the cause of action accrued at the time of the alleged breach of contract or at the time of the final administrative decision denying petitioner's claim under the disputes clause, and (2), if the former, whether the statute of limitations was tolled during the pendency of the proceedings under that clause.

STATUTES AND CONTRACTUAL PROVISION INVOLVED

28 U.S.C. 2401(a), provides:

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

The Wunderlich Act (Act of May 11, 1954, 68 Stat. 81) provides:

> Section 1 [41 U.S.C. 321]:
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute in-

volving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Section 2 [41 U.S.C. 322]:

No Government contract shall contain a provision making final on a question of law the decision of any administrative official representative, or board.

The standard disputes clause contained in the contract between petitioner and the government provides (R. 17):

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclu-

sive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

STATEMENT

On May 14, 1956, petitioner entered into a contract with the United States to manufacture and deliver 89,786 canteen covers of mildew-resistant felt for a total price of $60,691.76 (R. 16). The contract required petitioner to submit sample covers to the government for testing and inspection, and entitled the government to either reject those not meeting contract specifications or require their correction (R. 16). Under the contract's standard disputes clause (R. 17), the parties agreed that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer," and that an appeal from his decision could be taken to the Secretary of the Army or his duly authorized representative.

In accordance with the contract, petitioner submitted four lots of samples for testing and inspection (R. 17). After performing laboratory tests in October and November 1956, the government rejected the samples on the ground that they did not contain the quantities of various mildew inhibitors required by the

contract (R. 8, 17). Petitioner then requested the government to accept delivery of the non-conforming covers in consideration of a price reduction of one-half cent per cover, or a total of $270.01. The contract was modified to reflect the reduction, and final delivery of the covers was made on December 14, 1956 (R. 17).

On October 4, 1961, petitioner wrote to the contracting officer claiming, for the first time, that the government had employed improper methods in testing the samples, and demanding a refund of the $270.01 price adjustment plus an equitable adjustment for increased costs occasioned, it was alleged, by delay resulting from the government's rejection of the samples (R. 17–18). On February 21, 1962, the contracting officer denied the claim, finding that the government had employed a proper method of testing and that petitioner was not entitled to an increase in the contract price (R. 9). Petitioner appealed to the Armed Services Board of Contract Appeals. On February 28, 1963, the Board affirmed the contracting officer's decision (R. 18).

On July 31, 1963—five months after the Board's decision, but six years and seven months after petitioner had completed performance of the contract—petitioner brought suit in the district court under the Tucker Act (28 U.S.C. 1346(a)(2)), asking a refund of the $270.01 price adjustment plus a sum "not exceeding $10,000 as the court may deem just and equitable" as compensation for the alleged extra production costs (R. 18). On the basis of the decision of the court of appeals for the circuit in 1960 in *States Marine Corp. of Delaware* v. *United States*,

283 F. 2d 776 (C.A. 2), the district court held the complaint barred by the six-year limitations provision of the Tucker Act (28 U.S.C. 2401(a)), and granted the government's motion for summary judgment (R. 7).

The court of appeals affirmed *en banc* by a five-to-four vote. All of the judges agreed that petitioner's cause of action accrued, at the latest, on the date of the completion of contractual performance (1956), rather than at the time of final administrative denial of petitioner's claim (1963) (R. 19, 28).[1] Judge Waterman, joined by Chief Judge Lumbard and Judges Moore and Smith, adhered to the holding of *States Marine* that the running of the limitations period was not tolled while the contract procedures for the settlement of disputes were being pursued (R. 14–26). Judge Friendly, concurring, stated that he joined in this result because

[1] At the time, there was no conflict of decisions on this point. See *Northern Metal Co.* v. *United States*, 350 F. 2d 833, 836 (C.A. 3). Recently, however, the Court of Claims, in construing a similar statute of limitations (28 U.S.C. 2501), has held that if the contractor's claim is one required to be processed under the disputes clause, "the judicial claim does not ripen so as to trigger limitations until the duly-invoked decision of the administrative or arbitral board or tribunal (if that determination post-dates completion-and-acceptance)." *Nager Electric Co.* v. *United States*, Ct. Cl. No. 348–64, decided October 14, 1966, slip opinion, p. 8. *Nager* was followed by the Court of Claims in three decisions entered the same day. *Conn* v. *United States*, 366 F. 2d 1019; *United Contractors* v. *United States* (No. 42–63); *United States Steel Corp.* v. *United States*, 367 F. 2d 399. The government has filed motions for rehearing and reconsideration by the Court of Claims in the four cases, and has requested it to delay ruling on the motions until this Court has decided the present case.

of the precedent of *States Marine*, but that, were the issue "arising in this court for the first time, I might well be persuaded to the position taken" by the Third Circuit in the intervening decision of *Northern Metal Co.* v. *United States*, 350 F. 2d 833, which held that the statute of limitations was tolled (R. 27). Judge Anderson, joined by Judges Kaufman, Hays, and Feinberg, dissented, urging that *States Marine* be overruled and *Northern Metal* followed (R. 27).

SUMMARY OF ARGUMENT

The ultimate question in this case is whether, as the court of appeals held, petitioner's Tucker Act suit against the government was time-barred because filed more than six years after performance of the contract out of which petitioner's claim arose. Petitioner challenges the decision below on two alternative grounds. The first is that its cause of action did not arise until its administrative claim for relief under the standard disputes clause in the contract was denied by the Armed Services Board of Contract Appeals, and hence that the statute of limitations did not begin to run until that time. The second is that, even if the cause of action accrued earlier—when the contract was completed—the statute of limitations was tolled while the administrative proceedings under the disputes clause were in progress. We submit that the court of appeals properly rejected both contentions.

I

Petitioner's cause of action "first accrued", at the latest, when performance under the contract was com-

pleted; for the action was one upon the contract. That the contracting parties had agreed in the disputes clause to submit factual questions relating to any dispute initially to a form of arbitration did not change the character of the cause of action or postpone its accrual. *Unexcelled Chemical Corp.* v. *United States,* 345 U.S. 59; *McMahon* v. *United States,* 342 U.S. 25. The Tucker Act suit involved alleged wrongful conduct by the government during contractual performance—not a wrongful refusal to grant administrative relief under the disputes clause.

The novel position urged by petitioner would have serious practical consequences. Since the disputes clause specifies no time limitation for filing the administrative claim, contractors would not be subject to any effective period of limitations. At least with respect to many existing contracts, the government would have no protection against having to defend against stale claims. Congress cannot have intended this result. See *McMahon, supra,* 342 U.S. at 27.

II

If, as we urge, the cause of action accrued no later than completion of contractual performance, petitioner's action should be held untimely. Under settled principles, a tolling provision will not be read into a statute of limitations governing suits against the United States; Congress' waiver of sovereign immunity from suit is to be strictly observed in this as in other respects. *E.g., Soriano* v. *United States,* 352 U.S. 270. In the present context, application of this precept achieves a sound and workable accommo-

dation of the interests of the government and the contractor. Strict enforcement of the six-year limitation encourages prompt submission and diligent prosecution of the administrative claim under the disputes clause. At the same time, in those rare cases where the administrative proceeding cannot be completed within six years of the completion of the contract, the contractor can safeguard his rights by filing a protective action—a simple and familiar procedure which stops the running of the limitations period.

ARGUMENT

I. PETITIONER'S CAUSE OF ACTION ACCRUED, AT THE LATEST, WHEN PERFORMANCE OF THE CONTRACT WAS COMPLETED

Petitioner argues that its cause of action against the government in this suit, though based on the contract, accrued when its claim under the disputes clause was finally rejected by the Army. If so, the suit, commenced within five months of that final rejection, was not time-barred. All concede that, but for the disputes clause and the proceedings thereunder, the cause of action accrued no later than the completion of contractual performance—more than six years before the suit was brought—since by that date all events necessary to perfect the cause of action had occurred. See, *e.g.*, *Israel* v. *Baker*, 172 F. 2d 63 (C.A. 10); *City of Albany* v. *Leftwich*, 24 F. 2d 297 (C.A. 5), certiorari denied, 277 U.S. 599.[3] The issue

[3] Whether the cause of action may have accrued at an even earlier time—such as the date on which the government rejected the sample covers—is not an issue here; this suit was filed more than six years after any such date.

on this branch of the case is thus whether the disputes clause operated to postpone the date on which the cause of action "first accrue[d]" (28 U.S.C. 2401(a)). We think not.

A. UNDER SETTLED PRINCIPLES, THE PROVISION OF AN ADMINISTRATIVE REMEDY DOES NOT AFFECT THE ACCRUAL OF A JUDICIAL RIGHT TO REDRESS

The disputes clause is no more than an undertaking by the parties to submit all disputes concerning questions of fact arising under the contract to a type of limited arbitration, as a prerequisite to obtaining judicial relief. This voluntary[5] undertaking to defer seeking judicial redress plainly does not affect the character of the cause of action or postpone its accrual; the claim is still one for breach of contract.[6] If the canteen covers in fact met contract specifications, so that the government improperly refused to take delivery of them, petitioner's cause of action arose no later than the date of petitioner's completion of the

[5] In *United States* v. *Wunderlich*, 342 U.S. 98, 100, this Court noted the consensual nature of the disputes clause, stating:

"Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbital manner. This, as we have said in *Moorman* [*United States* v. *Moorman*, 338 U.S. 457] Congress left them free to do. * * *"

[6] In a suit for breach of contract, demand upon the defendant is frequently a prerequisite to suit; but it does not postpone accrual of the cause of action. An example would be a suit upon a note. If a note is due and payable on, say, December 31, 1956, the cause of action for failure to pay the sum due accrues on that date—not on the later date when the plaintiff makes a formal demand upon the defendant and the demand is rejected.

work of the contract (December 14, 1956). For by that time all the elements necessary to establish the breach, and entitlement to damages therefor, had come into existence—the testing of the samples, their rejection, the delays and increased costs incurred thereby, and the right to payment under the contract.

The Wunderlich Act, 68 Stat. 81, 41 U.S.C. 321–322 (*supra*, pp. 2–3), did not transform the contractor's cause of action into a right to challenge the administrative determination under the disputes clause.[5] The Act does not change the voluntary character of the clause; nor does it create any new right of action (see pp. 26–27, *infra*). So far as relevant here, it merely provides that in a suit on the contract the administrative determination may be disregarded if found to be arbitrary or unsupported by substantial evidence. The Act thus creates—for government contracts containing disputes clauses—a remedial procedure akin to that created by the doctrine of primary jurisdiction in cases where a claim that may be filed in court raises issues within the special competence of an ad-

[5] Many of the decisions delineating the standards of the Wunderlich Act have involved suits by the government on claims against the contractor, where the facts underlying the claim had been found in the government's favor in the administrative proceedings under the disputes clause. *E.g.*, *United States* v. *Hammer Contracting Corporation*, 331 F. 2d 173 (C.A. 2); *United States* v. *Taylor*, 333 F. 2d 633, 336 F. 2d 149 (C.A. 5); *Silverman Brothers* v. *United States*, 324 F. 2d 287 (C.A. 1); *United States* v. *Hamden Co-operative Creamery*, 297 F. 2d 180 (C.A. 2). All of these were actions on the contract. It has never been suggested that they were suits to enforce the administrative determination under the disputes clause.

ministrative agency.[5] A complaint is filed in the court initially;[6] but "the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 63–64; see, also, *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433. After the agency has made its determination, the judicial action resumes. The administrative determination—though reviewable in the judicial proceeding (see 28 U.S.C. 1398(b)—does not create a new cause of action or extinguish the original cause from which the suit arose. It follows that the statute of limitations runs from the original filing of the complaint. So this Court has held in contexts not essentially different from that at bar.

The Walsh-Healy Act, 41 U.S.C. 35 *et seq.*, empowers the United States to recover liquidated damages from contractors who knowingly employ child labor. The Secretary of Labor is authorized and directed to conduct investigations, to hold hearings and to "make findings of fact after notice of hearing," with respect to violations of the Act, and his findings (if supported by a preponderance of the

[5] The analogy of the judicial function in disputes-clause cases to that in the primary-jurisdiction area has previously been drawn by this Court. *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 717–713; *United States* v. *Grace & Sons*, 384 U.S. 424, 428.

[6] It is not suggested that the court would lack jurisdiction of the contractor's Tucker Act suit prior to completion of disputes-clause proceedings. See *Stein Brothers* v. *United States*, 337 F. 2d 861, 862–863, and *W.P.C. Enterprises* v. *United States*, 323 F. 2d 874, (both disapproved on other grounds in *United States* v. *Grace & Sons*, 384 U.S. 424, 430–431).

evidence) are conclusive in any judicial proceeding to enforce the Act (41 U.S.C. 38–39). In *Unexcelled Chemical Corp.* v. *United States,* 345 U.S. 59, the Secretary, in 1947, issued a complaint charging violations by Unexcelled during the years 1942–1945; the Secretary, in 1949, had made a final determination that Unexcelled was liable; and, less than a year later, the government had sued for damages. In response to the contractor's argument that suit was barred by the two-year statute of limitations of the Portal-to-Portal Act (29 U.S.C. 255), the government urged that the limitations period began to run only after the Secretary of Labor administratively determined that the contractor had violated the Act and was liable for liquidated damages. Holding the suit time-barred, this Court stated (345 U.S. at 65–66):

> We conclude that "the cause of action accrued," within the meaning of § 6 of the Portal-to-Portal Act, when the minors were employed. That was the violation of the Walsh-Healey Act, giving rise to the liability for liquidated damages. * * * The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings before the Secretary of Labor have been completed (*Far East Conference* v. *United States,* 342 U.S. 570; *Thompson* v. *Texas Mexican R. Co.,* 328 U.S. 134; *General American Tank Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422; *United States* v. *Morgan,* 307 U.S. 183) is a matter of judicial administration and of no relevancy here. The statutory liability accrued when the minors were em-

ployed. It was from that date that the period of limitations began to run.

Similarly, in the present case the cause of action arose when the alleged violation of the contractual duty occurred. That—and not the administrative decision on the matter—is the event that gives rise to the contractor's right to a recovery from the government. The contractual liability, if any, accrued at that time, and "[i]t was from that date that the period of limitations began to run." 345 U.S. at 66. We stress that this is not a case where the gist of the complaint is the government's failure to honor a claim. An action for a statutory refund arises only after there has been a demand by the plaintiff and a refusal of that demand that may be characterized as a breach of duty (*e.g., United States* v. *Taylor,* 104 U.S. 216, 221–222); a disbursing officer's action for relief from liability for lost funds arises only after accounting officers have refused to credit his accounts with the amount in dispute (*e.g., United States* v. *Smith,* 105 U.S. 620; *United States* v. *Clark,* 96 U.S. 37, 43–44). Compare p. 10, n. 4, *supra.* In such cases until administrative action is taken there is no breach of duty by government officials and, consequently, no basis for a damages claim. The present case is different. If the government had a duty to pay petitioner the amounts it claims, that duty arose no later than the date of its final delivery of the canteen covers.

The Court of Claims—in recently adopting the view, urged by petitioner here, that the cause of action does not accrue until final administrative action under the

disputes clause [8]—sought to distinguish *Unexcelled* on the ground that there the administrative procedure was "non-mandatory" and the claimant "could bring suit, if it wished, without following the administrative route" (*Nager Electric Co.* v. *United States*, Ct. Cl. No. 348–64, decided October 14, 1966, slip opinion, p. 14). But the Walsh-Healey Act clearly contemplates that adjudicatory hearings are to be held and the essential findings made by the Secretary of Labor, not the court (see pp. 12–13, *supra*; cf. *United States* v. *Winegar*, 254 F. 2d 693 (C.A. 10)),[9] and the Court in its opinion in *Unexcelled* nowhere suggested that the administrative procedure was merely permissive—or that permissiveness was a relevant factor.

Indeed, the Court had earlier held that an administrative remedy that was plainly mandatory nevertheless did not postpone the accrual of the underlying cause of action. In *McMahon* v. *United States*, 342 U.S. 25, a seaman who claimed he was injured aboard

[8] The court described this as the "uniform course of [its] practice" (*Nager Electric Co.* v. *United States*, Ct. Cl. No. 348–64, decided October 14, 1966, slip opinion, p. 7). However, only two of the decisions that it cites for this proposition (*id.* at p. 6, n. 11) involve the disputes clause and in both the statement was merely *dictum*. *Cosmopolitan Mfg. Co.* v. *United States*, 156 Ct. Cl. 142, 297 F. 2d 546, certiorari denied *sub nom. Arlene Coats* v. *United States*, 371 U.S. 818; *Electric Boat Co.* v. *United States*, 81 Ct. Cl. 361, certiorari denied, 297 U.S. 710. And there is language from that court which looks the other way (see pp. 18–19, *infra*).

[9] Thus, under both Walsh-Healey Act and under the Tucker Act where a disputes clause is involved, the judicial action can be brought before completion of the administrative proceedings; the court defers judicial action pending the administrative decision. See *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 717–718; *United States* v. *Winegar*, *supra*.

a government vessel filed suit more than two years after the injury occurred. Under the Clarification Act (57 Stat. 45, 50 U.S.C. App. 1291(a)), claims such as his could be enforced pursuant to the Suits in Admiralty Act (41 Stat. 525, 46 U.S.C. 741 *et seq.*) "if administratively disallowed in whole or in part". The latter Act in turn required that any suit thereunder "may be brought only within two years after the cause of action arises." 46 U.S.C. 745. The seaman argued that his cause of action could not arise until after his claim was "administratively disallowed," and therefore that his suit—commenced within two years after administrative disallowance of the underlying claim—was timely. This Court rejected the argument, holding that the action accrued at the time of the injury and that the limitations period began to run then. The Court reasoned that the limitation "depended upon the event giving rise to the claims, not upon the rejection" (342 U.S. at 27).

The Court of Claims in *Nager* thought *McMahon* distinguishable in the present context because of the following language in the Court's opinion (342 U.S. at 27):

> [W]e think it clear that the proper construction of the language used in the Suits in Admiralty Act is that the period of limitation is to be computed from the date of the injury. It was enacted several years before suits such as the present, on disallowed claims, were authorized. Certainly during those years the limitation depended upon the event giving rise to the claims, not upon the rejection. When later the right to sue was broadened to include such

> claims as this, there was no indication of any change in the limitation contained in the older Act. * * *

But this language describes precisely the situation with respect to dispute clauses. Before such clauses were commonly included in government contracts, the general rule in Tucker Act cases—as the Court of Claims itself in its *Nager* opinion (slip opinion, p. 4) pointed out—was that "normally the cause of action first accrues, and the statute begins to run, when the work is completed or the items delivered (and accepted), or the services rendered, or (if the contract was never completed) when the breach became total."[10] Accordingly, in that era (as in the years before enactment of the Clarification Act), the claim clearly accrued upon the occurrence of the breach or other event giving rise to the claim—not upon any administrative action on the claim. If the Clarification Act—which expressly confined suit to claims "administratively disallowed"—would not be read by this Court in *McMahon* as evincing a congressional intent to delay the accrual of the cause of action until administrative action was completed, *a fortiori* an agreement between the parties to have their disputes considered administratively does not postpone accrual.[11]

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[10] In support of this statement the court cited, *inter alia*, *Battelle* v. *United States*, 7 Ct. Cl. 297, 300; *Patterson* v. *United States*, 21 Ct. Cl. 322, 323; and *Carlisle* v. *United States*, 29 Ct. Cl. 414, 415.

[11] The Court of Claims also attempted to distinguish *McMahon* on the ground that the contractor, unlike the seaman in *McMahon*, does not have the power to determine when the period of limitations begins to run. We show, immediately below that the

B. THE RECENT RULING OF THE COURT OF CLAIMS—UNDER WHICH THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN UNTIL FINAL ADMINISTRATIVE DECISION UNDER THE DISPUTES CLAUSE—IS CONDUCIVE TO UNDUE DELAY IN THE DISPOSITION OF CONTRACT CLAIMS AGAINST THE GOVERNMENT

There is, we believe, a compelling practical reason to reject the view that the contractor's cause of action does not accrue until after the disputes clause procedure is exhausted. The contract fixes no time within which the contractor must present his claim to the contracting officer. He has, therefore, the exclusive power to decide when the disputes machinery will be invoked on any particular claim. Under petitioner's theory, the contractor could postpone the commencement of limitations indefinitely, thereby completely frustrating the congressional purpose in setting a six-year limitation. As the Court of Claims aptly observed in *Aktiebolaget Bofors* v. *United States*, 139 Ct. Cl. 642, 644, 153 F. Supp. 397, 399 (a case involving a simple arbitration provision in a government contract):

> The Government says that the running of the statute of limitations was not affected by the arbitration provision. We think the Government is right. The arbitration agreement is a provision for extrajudicial resolution of disputes, analogous to administrative remedies which are often available. A party may be barred from suit for failure to exhaust such remedies, but normally, the statute of limita-

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contractor does have the power to a large extent if the view of the Court of Claims is accepted.

A statute enacted by Congress only this year lends added support to the view that accrual of the contractor's cause of action is not affected by final agency decision under the disputes clause. Public Law 89–505, 80 Stat. 304, discussed *infra*, pp. 28–30.

> tions runs while he is pursuing them. *In the case of arbitration agreements, with no time limit, it would be intolerable that a party should prevent the statute of limitations from even beginning to run, merely by delaying his request for arbitration.* [Emphasis added.]

See, also, *McMahon* v. *United States, supra,* 342 U.S. at 27, where this Court pointed out:

> Since no time is fixed within which the seaman is obliged to present his claim, under petitioner's position he would have it in his power, by delaying its filing, to postpone indefinitely commencement of the running of the statute of limitations and thus to delay indefinitely knowledge by the Government that a claim existed. We cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of an action against the United States. * * *

In its recent *Nager* opinion, the Court of Claims suggested that the contractor is not free to present his claim whenever he desires, because various substantive clauses of the contract that govern equitable adjustments or comparable relief "usually have built-in-time limits, and where no specific period is established in the contract the contractor cannot delay unreasonably" (slip opinion, p. 23). While such time limits may in some circumstances prevent the contractor from enjoying unlimited discretion as to when to commence administrative proceedings, their effectiveness is limited. To begin with, many substantive clauses in current contracts specify no time limi-

tation at all.[12] Others have a time limit contingent on the happening of an event, or are otherwise highly indefinite. In addition, we point out that the Court of Claims has regularly declined to construe even time limitations absolute in terms as strictly barring tardy claims. See, *e.g.*, *Farnsworth & Chambers Co.* v. *United States*, 346 F. 2d 557; *H. L. Yoh Co.* v. *United States*, 153 Ct. Cl. 104, 288 F. 2d 493; *Vinegar Hill Zinc Co.* v. *United States*, 149 Ct. Cl. 494, 276 F. 2d 13; *Shepherd* v. *United States*, 125 Ct. Cl. 724, 113 F. Supp. 648. And such limitations would of course have no effect on "breach" claims joined with disputes-clause claims under the same contract. *United States* v. *Utah Construction Co.*, 384 U.S. 394.[13]

Thus, while the government could amend its procurement regulations to fix a definite time limit upon the presentation of any claim arising under the disputes clause to the contracting officer, such a limit would—the decisions of the Court of Claims so indicate—be difficult to enforce, and at all events far less definite and effective than the six-year statute of limitations in the Tucker Act. And to the extent it was enforced a fixed limit would eliminate the flexibility that administrative officers now have to consider and pay claims they believe to be meritorious. Nor would any change in the existing regulations affect the hundreds of millions—perhaps billions—of dollars of

[12] See, for example, the suspension of work clauses considered in *Jefferson Construction Co.* v. *United States*, Ct. Cl. No. 218-64, decided November 10, 1966; and *T. C. Bateson Construction Co.* v. *United States*, 162 Ct. Cl. 145, 147, 319 F. 2d 135, 136.

[13] See, further, p. 32, *infra*.

public contracts now outstanding. Thus, to hold that a claim under the disputes clause does not arise until final administrative determination could remove all effective time limitations upon countless contract actions. We point to the facts of *United States Steel Corp.* v. *United States* (367 F. 2d 399 (Ct. Cl.)), decided the same day as *Nager*. The contract was entered into in 1943 and completed in 1944 or 1945. In March, 1946, the contractor appealed a decision of the contracting officer to the Board of Contract Appeals, but the final administrative decision was not rendered until October 30, 1958.[14] Suit was filed in the Court of Claims on March 19, 1962. Under the Court of Claims' view, not only was this suit timely as to matters properly presented to and considered by the agency; the contractor was—as mentioned—also free to raise for the first time, some seventeen or eighteen years after the contract was completed, any breach claims it might have with respect to the contract, ~~claims~~, albeit such claims need not be submitted for administrative consideration. The difficulties inherent in defending against claims of that kind at so late a date need no elaboration.

In short, within very broad limits the contractor would, under the view of the Court of Claims, be free to choose when to commence the running of the period of limitations. This Court has ruled—in regard to a much shorter (two-year) statute of limitations—that "[w]e cannot construe the Act as giving

[14] Apparently the plaintiff did not prosecute its administrative claim diligently, and the matter lay dormant on the Board's docket for more than ten years (see 367 F. 2d 399, 405).

claimants an option as to when they will choose to start the period of limitation of an action against the United States." *McMahon, supra,* 342 U.S. at 27. Surely, no different result should follow here.

II. THE RUNNING OF THE STATUTE OF LIMITATIONS IN A CONTRACT ACTION AGAINST THE UNITED STATES IS NOT TOLLED BY THE ADMINISTRATIVE PROCEEDINGS REQUIRED BY THE STANDARD DISPUTES CLAUSE

If the Court agrees with our preceding point—that petitioner's cause of action accrued at the latest when contractual performance was completed, and that the statute of limitations thus began to run at that time—it must next consider whether the statue was tolled while the administrative proceedings under the disputes clause were in progress. If so, the suit is timely, since the period between the completion of contractual performance and the filing of the complaint in the district court, minus the period consumed in the administrative proceedings, was less than six years.

We believe that such a tolling provision cannot properly be engrafted upon the Tucker Act's statute of limitations. That statute provides that "[e]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. 2401(a) (*supra,* p. 2). Only if the plaintiff is overseas or under legal disability at the time the cause of action first accrued may he—under the express terms of Section 2401(a)—bring suit beyond the six-year period ("within three years after the disability ceases"). Under settled principles, further exceptions may not be implied in a statute limiting the time within which to sue the United States.

A. TIME LIMITATIONS IN STATUTES AUTHORIZING SUIT AGAINST THE UNITED STATES MAY NOT BE WAIVED OR TOLLED EXCEPT AS SPECIFICALLY PROVIDED BY CONGRESS

In a private action, the statute of limitations is merely a defense; like other defenses, it may be waived. And courts have frequently given liberal interpretations to statutes of limitations in order to mitigate the severity of holding a suit that may be meritorious time-barred. At the same time, the unique character of statutes of limitations governing suits against the United States has been repeatedly affirmed. In such a suit, the statute of limitations defines a condition upon the Legislature's waiver of the government's sovereign immunity from suit; it is jurisdictional; and, like other conditions upon that waiver, it must be strictly observed. Thus, in the absence of express congressional authority, government officers cannot waive the statute of limitations. *Munro* v. *United States,* 303 U.S. 37; *United States* v. *Michel,* 282 U.S. 656. As this Court explained in *Finn* v. *United States,* 123 U.S. 227, 232–233:

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; *but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims.* Since the Government is not

liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous. [Emphasis added.] [15]

More recent authority may be found in *Soriano* v. *United States*, 352 U.S. 270. Petitioner in that case, a resident of the Philippines, filed suit to recover just compensation for the requisitioning by Philippine guerrilla forces of foodstuffs and supplies from 1942 through January 1945, during the Japanese occupation of the Islands. His claim was filed with the United States Army Claims Service on March 30, 1948, and denied on June 21, 1948. He brought suit in the Court of Claims under the Tucker Act on April 26, 1951. Petitioner urged that the suit was timely because he was required to present his claim to the Army Claims Service before he could sue in court, and in any event because the war prevented his making the claim in time.

This Court rejected both arguments. It held that, since Congress had not made the exhaustion of administrative remedies a prerequisite to invoking the jurisdiction of the Court of Claims, to hold the statute tolled pending exhaustion "would but 'engraft * * * [another] disability upon the statute' and thus frus-

[15] In *United States* v. *Greathouse*, 166 U.S. 601, 606, the Court stated: "We may add that it was not contemplated that the limitation upon suits against the Government in the District and Circuit Courts of the United States should be different from that applicable to like suits in the Court of Claims."

trate the purpose of Congress." 352 U.S. at 275. Neither would the Court hold the running of the statute tolled by war, stating (*id.* at 275–276):

> To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress. For example, statutes permitting suits for tax refunds, tort actions, alien property litigation, patent cases, and other claims against the Government would be affected. Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied. *United States* v. *Sherwood*, 312 U.S. 584, 590–591 (1941), and cases there cited. * * *

Glus v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, and *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, relied on by the dissenting judges below, are actually in harmony with the *Soriano* principle. In both cases, to be sure, this Court held that the statute of limitations had been waived. But both were suits against a private employer under the Federal Employers Liability Act—not claims against the government. As we have seen, the distinction is

fundamental. In *Soriano* the Court rejected as precedent a decision involving the construction of a statute of limitations applicable to private litigation, remarking: "That case involved private citizens, not the Government. It has no applicability to claims against the sovereign." 352 U.S. at 275.

B. CONGRESS HAS NOT AUTHORIZED THE TOLLING OF THE TUCKER ACT'S STATUTE OF LIMITATIONS IN THE PRESENT CIRCUMSTANCES

No Act of Congress provides for the tolling of the Tucker Act's statute of limitations during the pendency of administrative proceedings under the standard disputes clause in government contracts; nor does any provision of law authorize government contracting officers to extend the statutory six-year period. This alone requires rejection of petitioner's claim that the statute of limitations was tolled here. But we also point out that there are affirmative indications that Congress did not intend the statute to be tolled in the present circumstances, and that sound reasons of policy support the result we urge.

1. In the Wunderlich Act Congress dealt explicitly with the administrative proceedings under the disputes clause, and assured limited judicial review of such proceedings in the contractor's Tucker Act suit (p. 11, *supra*). But Congress did not provide that the statute of limitations would be tolled during those proceedings. On the contrary, the House Report (H. Rep. No. 1380, 83d Cong., 2d Sess., p. 6) states:

> The committee forsees no possibility of the proposed legislation creating any new rights that a contractor may not have had prior to

its enactment, with the exception of the standards of review therein prescribed. Under the terms of the standard disputes clause the decision of a contracting officer is final unless the contractor appeals within 30 days. The Supreme Court in *United States* v. *Holpuch Co.* (328 U.S. 234), has held that unless a contractor pursues the administrative remedy of appeal to the head of the department which he is granted by the disputes clause, he loses his right to sue in the Court of Claims. Government contractors who have not appealed their decisions to the head of the department within the 30-day period will not be permitted to do so.

The statute of limitations regarding claims against the United States is jurisdictional and *prevents the consideration of a claim which is more than 6 years old.* Claims less than 6 years old, and *not heretofore filed in the courts may,* if filed, receive the protection of the proposed legislation. In this way the basic requirement of the 30 days, as well as the protection which the Government receives under the statute of limitations applicable to these matters, have been retained. [Emphasis added.]

This language, we believe, negates any possible inference that Congress meant the statutory six-year period to be enlarged by the filing of the administrative complaint under the disputes clause. On the contrary, Congress clearly believed that the Tucker Act's statute of limitations was jurisdictional and that the controlling factor in determining the timeliness of a claim was not the administrative filing, but the filing of the

claim "in the courts" within six years; and it determined to retain "the protection which the Government receives under the statute of limitations."

Recent legislation confirms the consistent congressional understanding that claims under government contracts containing disputes clauses accrue at the time of the occurrence of the underlying facts, and that the period of limitations is not tolled during the pendency of proceedings under that clause. Public Law 89–505, 80 Stat. 304 (1966), imposes a statute of limitations on suits by the government, providing in pertinent part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * *.

Obviously, if Congress believed that the administrative decision was an essential element of the cause of action, it would not have provided an additional "one year after final decisions * * * in applicable administrative proceedings required by contract" within which to file suit, for the government would have six years after the decision. And Congress' focus was expressly on disputes clauses:

> Subsection (a) of new section 2415 added by the bill provides for a 6-year limitation which would apply to all Government actions based on contracts whether express or implied in law or in fact. This provision would extend to obligations which are based on quasi-contracts. In all such contract matters, the action would be barred unless it were brought by the Government within 6 years after the right of action accrues, or within 1 year after a final decision in a required administrative proceeding, whichever is later. *This last provision, which has the effect of tolling the running of the statute of limitations during mandatory administrative proceedings, is necessary because of the great number and variety of such proceedings made possible by current statutes.* An administrative proceeding ordinarily consumes a considerable period of time and, as has been noted, the bill would permit the Government a year after the final administrative decision in which to present its case for judicial determination. *An example of such an administrative proceeding are those which involve appeals under the "disputes" clause of Government contracts.* [H. Rep. No. 1534, 89th Cong., 2d Sess., p. 4 (emphasis added); to like effect see S. Rep. No. 1328, 89th Cong., 2d Sess., p. 3.]

If, as the Court of Claims believes, the cause of action does not accrue until completion of the administrative proceedings, or if, as the Third Circuit believes, such proceedings automatically toll the period of limitations, no express provision for tolling would have been necessary. If—as Congress believed—an express provision "is necessary" in order

to provide for tolling in suits *by* the government, where no waiver of sovereign immunity is involved, it follows a *a fortiori* that an express provision is necessary to provide for tolling during disputes clause proceedings in suits by the contractor against the government.[16] When Congress has desired to suspend limitations on suits against the United States, it has done so expressly. For example, it has provided that limitations in the Suits in Admiralty Act shall be tolled pending administrative consideration of claims arising out of maritime contracts for war risk insurance (46 U.S.C. 1292). Congress has suspended limitations pending administrative consideration of claims for veterans' insurance (38 U.S.C. 784(b)), and for certain tort claims submitted for administrative settlement (28 U.S.C. 2401(b)). The Internal

[16] We also note that in the new statute, as in others where Congress has provided for a later filing because of contingencies such as disability or administrative proceedings, only a short period—one year—is allowed. Under the Court of Claims' view, the contractor would be allowed six years to sue after completion of the administrative proceedings. In actions for review of administrative decisions generally, suit must be filed within considerably less than a six year period. For example, suit for review of the administrative decision must be brought within sixty days thereof under the Social Security Act, 53 Stat. 1360, as amended, 42 U.S.C. 405(g); the Federal Trade Commission Act, as amended, 15 U.S.C. 45(c); and the Judicial Review Act of 1950, 5 U.S.C. 1034, which governs review of certain decisions of the Federal Communications Commission, the Secretary of Agriculture, the Maritime Commission, the Maritime Administration, and the Atomic Energy Commission. The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1436, 33 U.S.C. 921(a), allows only thirty days for commencing suit for review of a compensation decision.

Revenue Code expressly authorizes federal officers to extend the period of limitations, pending administrative action on tax claims, by written agreement with the taxpayer (26 U.S.C. 6532(a)(2)). The Tucker Act itself provides for tolling in the case of persons "under a legal disability or beyond the seas at the time the claim accrues"; suits by such persons may be brought within three years after the disability ceases (28 U.S.C. 2401(a), 2501). Having specifically provided for tolling in certain circumstances in many statutes—including the one in issue here—"Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." *Soriano* v. *United States*, 352 U.S. 270, 276.

2. To permit the filing of the administrative claim under the disputes clause to toll the Tucker Act's six-year statute of limitations would have unfortunate practical consequences. The contractor could wait until the six years had almost expired, file his administrative claim, and not until the claim had been denied—no matter how protracted the administrative proceeding—bring suit under the Tucker Act. The contractor would have no incentive either to file the administrative claim promptly or to prosecute it diligently. In addition, the government would be required to defend claims under highly disadvantageous circumstances, due to the lapse of time since the occurrence of the facts on which the claim was based.

It is no answer, as the Third Circuit in *Northern Metal* and the dissenting judges below suggested, that once the administrative claim has been filed the gov-

ernment is on notice of the claim. (That was true in *Soriano* also.) The government might still have grave difficulty in preserving an effective defense. In addition, many claims arising from government contracts are so-called "breach" claims that are not within the scope of the standard disputes clause and hence need not be asserted administratively before a Tucker Act suit is brought. *United States* v. *Utah Construction Co.*, 384 U.S. 394. In many cases both types of claim are involved, and they may involve factually distinct issues. Yet, as the Court of Claims pointed out in its recent *Nager* decision (see pp. 14–15, *supra*), if the period of limitations is tolled during the pendency of administrative proceedings as to claims covered by the disputes clause it should be tolled as to breach claims as well, under "the principle that one indivisible contract normally gives rise only to one cause of action" (slip opinion, p. 25).

Nor can a rule of tolling be defended as necessary to avert hardship to government contractors. In *Soriano* this Court refused to engraft a tolling provision upon those expressly provided by Congress even though, in some cases, war might make it impossible for a claimant to preserve his position. There is no comparable hardship in the present context. In those unusual circumstances where a contractor finds the six-year period of limitations expiring without his having obtained a final agency decision,[17] he is not without a remedy. He can, with

[17] Such circumstances are absent here. Petitioner waited more than four years before asserting his claim administratively. That delay is not explained by the allegation of the

little cost or effort, safeguard his rights completely by filing a protective suit. The judicial proceeding may then be stayed pending final agency decision. *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d 776, 779 (C.A. 2); R. 20. This is a familiar and well recognized procedure.[18] *United States* v. *Winegar*, 254 F. 2d 693 (C.A. 10), illustrates its operation in a related context. The United States had filed suit to recover liquidated damages from a contractor under the Walsh-Healey Act. While administrative proceedings under the Act were still ongoing, the statute of limitations was running. *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59 (pp. 13–14, *supra*). The Tenth Circuit held that, instead of dismissing the case, the district court should have retained it on its docket pending completion of the administrative proceedings.

We stress that only in the unusual case will the contractor be required to file a protective action.

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complaint that the United States did not inform petitioner until March 20, 1959, of the method used in testing the samples (R. 1, 2). For there is no allegation that prior to 1959 petitioner had claimed that the samples met the contract specifications, or inquired as to the method used in testing them.

[18] It is similar to that prescribed by this Court in cases where the enforcement of a claim originally cognizable in court "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 63–64; see, also, *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 220–221; pp. 11–12, *supra*.

Moreover, the relatively small cost which this course involves can almost always be avoided by the prompt submission of claims to the contracting officer and their diligent prosecution before him and the contract appeals boards. The average time between docketing and disposition of cases in the Armed Services Board of Contract Appeals is eleven months. Spector, *Is It "Bianchi's Ghost" Or "Much Ado about Nothing?"* 29 Law and Contemp. Probs. 87, 99 (1964). In this case, for example, the contracting officer decided petitioner's claim less than five months after it was first submitted to him, and the Board's final decision was rendered approximately one year later (R. 17–18). Thus, there would have been no problem of limitations here had petitioner promptly presented its claim to the contracting officer, instead of delaying almost five years before doing so.[19]

Since protective actions are thus bound to be few and infrequent, there is no basis for the concern voiced by the dissenting judges below and the Third Circuit in *Northern Metal*—that such actions are a burden on the federal court system. In addition, it is plain that the problem of crowded court dockets is aggravated by cases that are ready to proceed to trial, and not by cases which are merely held in abeyance by understanding of the court and the parties. Protective actions are easily handled by a stipulation between the contractor and the govern-

[19] Even after waiting for almost five years to file its claim administratively, petitioner was placed fully on notice by the Second Circuit's decision in *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d 776, in 1960, of its right to file a protective action.

ment to stay the matter pending the agency decision; they require minimal judicial attention.

Thus the decision below achieves a sound and practical accommodation between the interests of the government and of the contractor. The government is protected against stale claims; diligent pursuit of the administrative remedy under the disputes clause is encouraged; and the contractor has a simple method of preventing his claim from being time-barred in those very few cases where a final administrative decision cannot be obtained promptly.[20]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[20] That Congress approves the use of protective actions is reflected by Section 3 of the Federal Arbitration Act, 9 U.S.C. 3. That statute expressly provides that an action involving any issue referable to arbitration under a written agreement for such arbitration shall be stayed pending completion of the arbitral process.

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